IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 138 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

SHANTILAL BHOGILAL

Appearance:

1. INCOME TAX REFERENCE No. 138 of 1989
MR MANISH R BHATT for Petitioner No. 1
NOTICE SERVED BY DS for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE K.M.MEHTA

Date of decision: 21/11/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

At the instance of the revenue, the following questions of law have been referred to this Court for its opinion under the provisions of Section 256(2) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") by the Income Tax Appellate Tribunal, Ahmedabad, Bench "A".

(1) "Whether, the appellate Tribunal has been right in law and on facts in holding that the proceedings of reassessment were invalid and the capital gains could not be brought to tax in the asst. year 1967-68 in question?"

(2) "Whether, the Appellate Tribunal has been right in law and on facts in holding that all the necessary facts were before the I.T.O. to assessee the capital gains for the A.Y. 1967-68 prior to his seeking the original assessment and hence reopening was not Valid?"

(3) "Whether, the Appellate Tribunal has been right in law and on facts in holding that section 147(a) was not applicable in this case and the proceedings under section 147(b) were time barred, since they were made more than 4 years after the original assessment?"

2. Learned Senior Central Government Standing Counsel Shri Manish R. Bhatt has appeared for the revenue whereas nobody has appeared for the respondent-assessee though the respondent-assessee has been duly served with the notice of this Court.

3. The facts giving rise to the present Reference in a nutshell are as under;

3.1. The petitioner is an H.U.F. whose land and building had been acquired by the Government authorities. Notification under Section 4 of the Land Acquisition Act had been published on 16th August, 1960 whereas notification under Section 6 of the said Act had been published on 20th February, 1964. Compensation had been awarded to the assessee on 5th March, 1965 and possession of the land in question was handed over by the assessee to the concerned Government authority on 30th June, 1966.

3.2. In the return for the assessment year 1965-66, the assessee had shown the income of capital gains

arising on account of the said acquisition. Subsequent to filing of the return, the assessee had addressed a letter to the Assessing Officer and had also filed a revised return whereby he had deleted the income which had arisen by way of capital gains. Thus, the amount of capital gains was not shown in the return filed for the assessment year 1965-66. The Assessing Officer accepted the return without inclusion of the said capital gains. The assessment order had been confirmed by the Tribunal by an order dated 30th September, 1975. Thus, the income which had been earned by way of capital gains by the assessee was not taxed in assessment year 1965-66.

3.3. It is pertinent to note that in an appeal filed by the assessee, ultimately, the Tribunal had passed a final order on 30th September, 1975. The Tribunal had opined that the said income of capital gains should be taxed during the assessment year 1967-68. The possession of the land, which was subject matter of the acquisition, was given by the assessee to the concerned Government authority on 30th June, 1966. The said finding of the Tribunal was not challenged either by revenue or by the assessee and thus it became final.

4. We are concerned with the return which was filed by the assessee for the assessment year 1967-68. The previous year for the said relevant assessment year is S.Y. 2022. In the said return, the assessee did not show the income which had arisen by way of capital gains upon acquisition of land bearing Survey No. 4142 and 4143 situated at Raikhad Ward Near Bhadra, Ahmedabad. The return was filed by the assessee on 6th September, 1967. After filing the return, the assessee had addressed a letter dated 7th December, 1967 to the Assessing Officer in pursuance of an earlier letter dated 15th October, 1966 which was written by the assessee to the Assessing Officer in relation to the assessment year 1967-68.

5. In the said letter, the assessee had stated that he would not object if the income which it had earned by way of capital gains arising from the acquisition of the land was taxed in the assessment year 1967-68 and he further stated that the letter be treated as a revised return. Thus, for the assessment year 1967-68, he had offered the amount of capital gains for tax.

6. The assessment was framed by the Assessing Officer on 7th November, 1970. While framing the assessment, the amount of capital gains referred to hereinabove had not been included in the income though

the assessee had stated earlier that he wanted his letter dated 6th December, 1967 to be treated as a revised return and he wanted to offer the amount of capital gains for tax for the assessment year 1967-68.

7. It is pertinent to note that the Assessing Officer, in a notice issued under Section 148 of the Act, had recorded in unequivocal terms that the Tribunal had held in paragraph 16 of the order dated 30th September, 1975 that the property was transferred only on 30th June, 1966. In view of the said fact, capital gains were taxable in the assessment year 1967-68 and inspite of the said fact, the assessee had not disclosed the amount of capital gains in his return for the assessment year 1967-68, which was submitted on 6th September, 1967.

8. This fact denotes that the Assessing Officer, while issuing notice under Section 148 was making an effort to give effect to the Tribunal's order dated 30th September, 1975 which was passed in relation to the assessment year 1965-66

9. The Tribunal had held, by an order dated 30th September, 1975, that the income under the head capital gains was not to be taxed during the assessment year 1965-66 but it was to be taxed in the assessment year 1967-68. Notice under Section 148 of the Act was issued to the assessee on 23rd December, 1975. In pursuance of the said notice, the assessee filed return on 18th June, 1976 but he did not mention anything about the capital gains referred to hereinabove and in the head of capital gains he had put a dash showing that the income derived by the assessee under the said head was "nil" for the said period.

10. Ultimately, the Assessing Officer, upon reassessment, passed an order dated 24th July, 1976, and by virtue of the said reassessment order, he included the amount of capital gains in the income of the assessee for the assessment year 1967-68.

11. Being aggrieved by the reassessment order, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals). It was submitted by the assessee that notice issued to the assessee under the provisions of Section 148 was illegal. According to the assessee, there was no reason for issuance of notice under Section 148, as the conditions incorporated in Section 147 of the Act had not been fulfilled. The Commissioner of Income-tax (Appeals) dismissed the appeal and, therefore, the assessee filed an appeal before the Tribunal.

12. After hearing the concerned parties, the Tribunal allowed the appeal because the assessee had informed the Assessing Officer under his letter that he wanted his income under the head capital gains to be taxed for the assessment year 1967-68. According to the Tribunal, the Assessing Officer was having all relevant details with regard to the income which the assessee had earned under the head capital gains on account of acquisition of land of the assessee. As the relevant details were available with the Assessing Officer when the assessment was framed, according to the Tribunal, the notice which was issued by the Assessing Officer under the provisions of Section 148 of the Act was not proper and, therefore, the reassessment was bad in law. In the aforestated circumstances, at the instance of the revenue, the questions referred to hereinabove have been referred to this Court for its opinion.

13. Looking to the facts of the case, this Court has to decide whether notice which was given to the assessee under the provisions of Section 148 of the Act was proper and whether the reassessment order passed by the Assessing Officer for the assessment year 1967-68 dated 24th July, 1976 was just and proper.

14. Learned Senior Central Government Standing Counsel Shri M.R. Bhatt has submitted that the Tribunal did not consider certain relevant and material facts while allowing the appeal. It has been submitted by him that in fact the notice had been issued to the assessee for reassessment in pursuance of an order dated 30th September, 1975 passed by the Tribunal in relation to assessment year 1965-66. He has drawn our attention to the said order of the Tribunal whereby the Tribunal decided the fact that the income under the head capital gains did not arise in the assessment year 1965-66 but the said income was earned by the assessee during the assessment year 1967-68 as possession of the land in question was handed over by the assessee to the concerned authority on 30th June, 1966. As stated hereinabove, the said finding of the Tribunal for the assessment year 1965-66 had not been challenged by anybody. In view of the said fact, so as to give effect to the order passed by the Tribunal dated 30th September, 1975 for the assessment year 1965-66, notice dated 23rd December, 1975 under Section 148 of the Act had been given to the assessee by the Assessing Officer.

15. It has been submitted by learned Standing Counsel Shri M.R. Bhatt that according to the order passed by

the Tribunal, the income was to be taxed in the assessment year 1967-68. The said fact cannot be disputed as stated hereinabove because the said order of the Tribunal had become final.

16. Inspite of the fact that by an order dated 30th September, 1975, it was held by the Tribunal that the income had arisen for the assessment year 1967-68 and though the said fact was very well known to the assessee, in pursuance of notice dated 23rd December, 1975 issued to the petitioner under the provisions of Section 148 of the Act, the assessee did not disclose that he had earned the income under the head capital gain and, therefore, the Assessing Officer under his reassessment order dated 24th July, 1976 considered the assessee's income arising under the head capital gains for the year 1967-68.

17. It is pertinent to note that the Tribunal did not consider the fact that reassessment had to be made in pursuance of an order passed by the Tribunal dated 30th September, 1975 in relation to the assessment year 1965-66. So as to give effect to the said order of the Tribunal, it was necessary for the Assessing Officer to reassess the income of the assessee for the assessment year 1967-68. It is also pertinent to note that the assessee, initially, for the assessment year 1965-66, had declared that he had received the income under the head capital gains on account of acquisition of land in question but subsequently by filing a revised return he declared that no income had arisen under the head capital gains. The said position had been accepted by the Tribunal finally as stated hereinabove.

18. Even if we consider the argument which was advanced on behalf of the assessee before the revenue authorities and the Tribunal that the assessee had made complete disclosure and the assessee had disclosed fully and truly all material facts for the purpose of assessment, it cannot be ignored that the notice under Section 148 had to be issued so as to give effect to the order dated 30th September, 1975 passed by the Tribunal

19. Looking to the provisions of Section 150 of the Act it is very clear that at any time for the purpose of making an assessment or reassessment or recomputation in consequence or to give effect to any finding or direction contained in an order passed by any authority in any proceedings under the act by way of Appeal, Reference or Revision notice under Section 148 can be issued at any time. Looking to the facts stated hereinabove and the provisions of Section 150 of the Act, in our opinion, it

was open to the Assessing Officer to issue notice under Section 148 of the Act for reassessing the income of assessment year 1967-68.

20. In view of the above referred legal position, in our opinion, the Tribunal was not right while setting aside the reassessment order dated 24th July, 1976. In the circumstances, we answer the first question in the negative i.e. against the assessee in favour of the revenue.

21. It is not necessary to answer the second and third questions in view of the answers given to the first question.

The reference thus stands disposed of accordingly with no order as to costs.

(A.R. DAVE,J.)

(K.M. MEHTA,J.)

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